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# Supreme Court of the United States

**OCTOBER TERM, 1962**

**No. [redacted]/162**

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., et al.,

*Petitioners,*

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY and TEXAS COTTON INDUSTRIES, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners herein respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a decision and order of that Court. The petitioners are the Far East Conference and all of its members. Those members are as follows: American President Lines, Ltd.; Daido Kaiun Kaisha, Ltd.; Skibsaktieselskabet Varild; Aksjeselskapet Marina; Aktieselskabet Glittre; Dampskibsinteressentskabet Garonne; Aktieselskabet Standard; Fearnley & Egers Befragtningsforretning A/S; Skibsaktieselskapet Sangstad; Skibsaktieselskapet Soldstad; Skibsaktieselskapet

Siljestad; Dampskibsaktieselskabet International; Skibsaktieselskapet Mandeville; Skibsaktieselskapet Goodwill; Universal Trading & Shipping Agency Aksjeselskap; Iino Kaiun Kaisha, Ltd; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Lykes Bros. S.S. Co., Inc.; Mitsubishi Kaiun Kaisha, Ltd.; Mitsui Steamship Co., Ltd.; Dampskibsselskabet af 1912 Aktieselskab; Aktieselskabet Dampskibsselskabet Svendborg; Nippon Yusen Kaisha; Osaka Shosen Kaisha, Ltd.; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc.; Global Bulk Transport Incorporated; United States Lines Company; Waterman Steamship Corporation; United Philippine Lines, Inc.; Wilhelmsens Dampskibsaktieselskab; A/S Den Norske Afrika-og Australielinie; A/S Tonsberg; A/S Tankfart I; A/S Tankfart IV; A/S Tankfart V; A/S Tankfart VI; Yamashita Kisen Kaisha, Ltd; Maritime Company of the Philippines, Inc.

For brevity the Conference and all of the above members are hereinafter collectively referred to as the "Far East Conference."[1]

[1] For convenience of all of the parties, three cases instituted before the Federal Maritime Board against the Petitioners by H. Kempner, Galveston Cotton Company and Texas Cotton Industries, were consolidated, for hearing purposes only, with a case instituted by H. Kempner against the Gulf/Mediterranean Ports Conference and a case instituted against the Far East Conference and its members by Isbrandtsen Company, Inc. In the latter two cases petitions for writs of certiorari have been filed in this Court and assigned, respectively, numbers 1002 and 1082. The consolidation for hearing by the Board was agreed to because a number of the same witnesses would be called in all five cases. In other respects, the cases against the Petitioners differs significantly from any of the other cases.

## Opinion Below

The opinion and order of the court below has not yet been officially reported. It is, however, reported at 313 F. 2d 586, and printed as Appendix A to this petition.

## Jurisdiction

The jurisdiction of this Court is invoked under §10 of the Review Act of 1950, 64 Stat. 1132 (5 U.S.C. §1040), and under 28 U.S.C. §1254(1). This petition is timely, the order of the court below having been entered January 10, 1963, and an order denying the petition of the petitioners herein for a rehearing having been entered on February 26, 1963.

## The Questions Presented

1. Whether, when the Federal Maritime Commission[2] has found that it has approved, under §15 of the Shipping Act, an agreement among a group of common carriers and that finding is supported by substantial and uncontradicted evidence that the Commission has, over a period of years, taken numerous formal actions approbative of the agreement and has entered no order disapproving such agreement, the

[2] Pursuant to Reorganization Plan No. 7 of 1961 (H. Doc. 187, 87th Cong., 1st Sess.; note following § 1111 of Title 46, U.S.C.A.), in accordance with the Reorganization Act of 1949, 63 Stat. 203, as amended (5 U.S.C. §§ 133z to 133z-15), the Federal Maritime Board, which made the Order under review, was abolished on August 11th, 1961, and all of its functions under the Shipping Act, 1916, 39 Stat. 728, as amended (46 U.S.C. §§ 801, *et seq.*), so far as here material, were transferred to the Federal Maritime Commission which was created by the Reorganization Plan. The Federal Maritime Commission and its predecessors are hereinafter sometimes referred to as the "Commission."

Court of Appeals can properly hold that such agreement has not been approved for want of compliance with procedural formality which no court has defined and which is not prescribed in the statute.

2. Whether after the amendments to the Shipping Act between August 12, 1958, and October 3, 1961, the Court of Appeals may, as to pre-May 19, 1958, transactions, properly construe or apply any section of the Shipping Act so as to forbid or make unlawful a dual rate contract arrangement which was in use on May 19, 1958, by a conference which was organized under an agreement approved under §15 of the Shipping Act, when the Commission had not at any time disapproved, cancelled or modified such dual rate arrangement.

3. Whether a shipper against whom a common carrier by water has unjustly discriminated can recover reparation by mere proof that it paid freight at a higher rate than competitors for transportation of the same commodity without proof of injury in the marketing of that commodity and the amount of the injury.

## Statutory Provisions Involved

The statutory provisions involved are: §10 of the Review Act of 1950, 64 Stat. 1132 (5 U.S.C. §1040); 28 U.S.C. §1254(1); §§15, 16, 17, and 22 of the Shipping Act, 1916, 39 Stat. 733-734, 736, as amended prior to October 3rd, 1961 (46 U.S.C. §§814-816, 821 (1952)); Pub. L. 85-626, 72 Stat. 574 (August 12th, 1958); Pub. L. 86-542, 74 Stat. 253 (June 29th, 1960); Pub. L. 87-75, 75 Stat. 195 (June 30th, 1961); Pub. L. 87-252, 75 Stat. 521 (September 16th, 1961); and

Pub. L. 87-346, 75 Stat. 762 (October 3rd, 1961). These lengthy statutory provisions are printed in Appendix B.

## Statement of the Case

The Far East Conference is a group of common carriers by water who, pursuant to a conference agreement duly approved on November 14, 1922, under §15 of the Shipping Act, 1916, 39 Stat. 733 (46 U.S.C. §814), establish tariffs of rates for the transportation by its members of property from United States Atlantic and Gulf Ports to the Far East (J. A. 325). The conference agreement contains no express provision for the adoption of a contract system (J. A. 35, 36). Until about 1929, the Conference had been able to maintain a stable rate structure. In 1929, rates became very unstable and the Conference members established a contract system which has been in use ever since (J. A. 405). This system has undergone changes as required by the times, *e.g.*, changes in the differential between contract and non-contract rates and the inclusion within the system of a widening range of commodities (J. A. 406-9).

All of the minutes and tariffs of the Conference reflecting the adoption of and changes in the contract system, including the extension of the system to cotton, were filed with the Commission. The Commission itself found that these minutes were filed, reviewed by its staff and no exception taken (J. A. 474). However, the Commission's approval was not, as intimated in the opinion below, limited to silent acceptance of these filings.

At varying times between July, 1934 and March, 1936 the Commission approved, under §15 of the Shipping Act, eighteen separate agreements between the Far East Conference and eighteen intercoastal carriers which transported cargo from Atlantic or Gulf ports to Pacific Coast ports for on-carriage to the Far East by Trans-Pacific lines. Each of these eighteen agreements contained the following clause:[3]

> "The Conference carriers agree that they will give the intercoastal carrier *the privilege of participating in the carriage of cargo of shippers having contracts with the Conference carriers*, at rates and under conditions provided in said *contracts*." (Emphasis supplied.)

The formal approval of these agreements, necessarily encompassed approval of the Far East Conference contract system.

In 1934, the Commission, disturbed by the continuing rate instability in a number of trades including the Far East trade, instituted a proceeding entitled *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470 (1935). The report of that proceeding (1 U.S.S.B.B. at 479-480), describes and favorably discusses the Far East Conference contract system.

In January, 1950, the Commission intervened in the antitrust suit instituted by the Department of Justice against the Far East Conference based upon its use of an allegedly unapproved contract system. In

[3] An illustrative contract is set forth in Appendix C to this Petition, and a schedule of the seventeen additional contracts is set forth in Appendix D hereto. These appendices are, respectively, Appendix C and Appendix D attached to the Joint Appendix and certified by the Clerk of the Court of Appeals.

this Court (*Far East Conference* v. *United States*, 342 U.S. 570 (1952)), the Commission filed a brief which assured this Court (pp. 13, 35, and 36) that it had fully approved the Far East Conference contract system citing *Section 19 Investigation, 1935, supra*, as one of the evidences of approval.

Finally, in *American Hawaiian Steamship Co. et al.* v. *Intercontinental Marine Lines, Inc.*, 4 F.M.B. 160, 165 (1953), the Commission ruled that the failure of the Far East Conference to admit Intercontinental to Conference membership "*including participation in shipper's contracts* entered into pursuant to [the Conference] Agreement No. 17 will result in said agreement and contracts being unjustly discriminatory and unfair as between respondent and complainants * * *." (Emphasis supplied)

Thus, not only by silence, but also by at least 22 separate, affirmative acts, documents and formal orders, the Commission has specifically referred to the Far East Conference contract system and taken action with respect thereto as a duly effective and duly approved agreement.

Until February 7, 1950, the Far East Conference contract system had never been applied to baled cotton (J.A. 469). During the decade preceding World War II, the shippers of baled cotton had suffered from such violently fluctuating and unstable ocean rates, that the future dealing in cotton became a hazardous gamble on ocean freight rates rather than the marketing of a staple commodity (J.A. 410). The large shippers invariably benefited because they could charter vessels at low rates and could bargain more effectively with regular common carriers (J.A.

104, 105). The result was that in January, 1950, after international trade was released from wartime restrictions, the American Cotton Shippers Association requested the Far East Conference to extend their contract system to baled cotton (J.A. 473, 474). The Far East Conference acceded to this request after discussion with Commission personnel (J.A. 411). New tariff pages reflecting this extension were filed in accordance with the specific recommendations of the Commission staff (J.A. 411).

The Respondent, H. Kempner, is a Massachusetts trust. The Respondent, Galveston Cotton Company, is a wholly-owned subsidiary of H. Kempner, and Texas Cotton Industries is a corporation in which H. Kempner has a substantial interest. All are engaged in the business of buying and exporting cotton and are under the management of Mr. Harris Kempner (J.A. 471). For brevity, these three entities will be collectively referred to as "Kempner".

Kempner became a contract shipper, but when he was detected in contract violation he terminated his agreement (J.A. 198, 199, 470).

By complaints to the Commission, Kempner charged that the Far East Conference contract system was illegal, *inter alia*, for want of approval under §15 of the Act, and sought reparation in the amount of the difference between freight he had paid at the non-contract rates and such freight computed at the lower contract rates. At the hearings Kempner offered no evidence of damages due to discrimination against him.

The Commission, on an extensive record, dismissed the complaints on the grounds, among others, that

the Far East Conference contract system had been duly approved and that Kempner had not proved damages due to discrimination. Kempner petitioned the court below for review of the Commission report and order. That court, in a *per curiam* decision, held that the discriminatory rates had not been approved, because the court found that the Commission had not taken undefined procedure but was only silent with respect to these rates, and they were therefore illegal. As to the amendatory legislation adopted in August, 1958, to legalize existing contract systems pending congressional investigation of those systems, the decision merely stated, without explanation, that this legislation was prospective only and did not relieve a carrier from liability for reparation arising out of the charge of non-contract rates prior to August, 1958. The case was ordered remanded to the Commission for assessment of reparation.

Judge Danaher dissented on the ground that the amendatory legislation was retroactive and deprived Kempner of any rights which he might have had if the Far East Conference contract system had not been duly approved (Appendix A, pp. A-3—A-7).

## Reasons for Granting the Writ

### I. It Is of Paramount Public Importance That the Procedural Requisites for Approval Under §15 of the Shipping Act of Agreements Among Common Carriers by Water and Other Persons Subject to the Act Be Judicially Defined.

The Shipping Act was enacted in 1916, following an extensive House Committee investigation of rate-fixing agreements among common carriers by water.

The committee concluded that the public interest would best be served if such agreements were exempted from the operations of the antitrust laws and subjected to a requirement that they be filed with a regulatory agency which should approve them unless they should violate prescribed criteria.[4] The recommendations of the committee were followed and the provisions for filing and approval became §15 of the Shipping Act—the very heart of the regulation of water transportation.

From 1916 to 1954, the administrative practice relied upon by the shipping industry was that rate making conferences, acting under approved agreements, had authority within the purview of that approval lawfully to establish contract rate systems. In 1954, the Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co. v. United States*, 93 App. D.C. 293, 211 F. 2d 51, cert. denied *sub nom. Japan Atlantic & Gulf Freight Conference v. United States*, 347 U.S. 990 (1954), decided that the determination of a conference to institute a contract system was a new agreement and, therefore, required §15 approval. The court did not, however, specify what Commission action would constitute approval.

The court indicated that parties to an approved rate making agreement would require further approval for any concerted action which was not an "interstitial adjustment" in their rate making activities. This vague standard for differentiating between actions which are and actions which are not within the

[4] H. Doc. No. 805, 63rd Cong., 2d Sess. (1914) pp. 415-421. Because H. Doc. No. 805 is difficult to obtain, excerpts therefrom were printed as a joint appendix to the Government brief in *Federal Maritime Board v. Isbrandtsen*, Nos. 73 and 74, Oct. Term 1957 (356 U.S. 481).

purview of the original approval of a rate making agreement has already resulted in numerous proceedings in which various conference actions which had long been assumed to be within the purview of the approval of the basic conference agreement, have been challenged as new agreements. The wide-ranging scope of this reexamination is only suggested by the following illustrations:

a) A change of interpretation of a clause in a shipper's contract. *Anglo-Canadian Shipping Co.* v. *United States*, 264 F. 2d (9th Cir. 1959).

b) Actions taken under an approved joint agreement between conferences. Commission Docket No. 872 (still pending).

c) Absorption of rail rates. Commission Docket No. 1102 (still pending).

d) Limitation on brokerage payments. *American Union Transport* v. *United States*, 103 App. D.C. 229, 257 F.2d 607, cert. denied, 358 U.S. 828 (1958).

The foregoing does not purport to be a complete catalogue of the action among carriers and among other persons subject to the Shipping Act which have been, or may in the future be, for the first time questioned as to the need for separate §15 approval. For example, there are through-freighting agreements, joint service agreements, freight forwarder agreements and agreements among terminal operators. What is decided in this case with regard to the requisites of adequate approval will affect all such cases.[5]

[5] Although, in 1961, the Congress substantially amended the second paragraph of §15 by adding a new criterion for disapproval, it continued the omission of any specified procedure for approval.

The law would appear to have created a trap for the unwary if activities, conducted for many years with the full knowledge and approval (as that term is understood by the man in the street) of the regulatory agency and without any intimation of illegality, should suddenly, by administrative or judicial decision, be held to be §15 agreements and illegal for want of approval by a procedure neither described in the statute nor delineated by the courts. The price of such unwitting violation may be up to $1,000 for each day that it has continued. Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814).

Whether the ultimate conclusion be harsh or lenient, we submit that the question of the requisites for approval under §15 as amended in 1961 should be settled by this Court.

We submit that the question of the prerequisites for §15 approval is not only important but also that the court below erroneously decided that the prerequisites had not been met in the instant case. The Commission in its report (J.A. 484) specifically found that it had approved the Far East Conference contract system. The administrative record before the Court of Appeals contained, as we have shown, twenty-two separate, affirmative actions of the Commission with respect to the Far East Conference contract system, which clearly evidenced Commission favor. There was no evidence to the contrary. When an administrative agency makes a finding of fact which is supported by substantial and uncontradicted evidence, a court oversteps its authority when it disregards that finding and reverses the conclusion based thereon (§10(e)(B)(5) of the Administrative Procedure Act, 60 Stat.

243 (5 U.S.C. §1009(e)(B)(5)). We submit that the court below also disregarded the principles of review under which an agency's interpretation of its own action will be given great weight.

## II. Pub. L. 85-626 and the Acts Extending and Supplanting It Preclude a Holding That a Contract System in Use on May 19, 1958, Was Illegal for Want of §15 Approval.

*Federal Maritime Board* v. *Isbrandtsen Company, Inc.*, 356 U.S. 481 (1958), created serious doubt whether any of the sixty contract systems then in use could pass the tests for legality announced in that case. In order to prevent the chaos which would ensue from the elimination of all such systems pending a thorough investigation,[6] the Congress enacted Pub. L. 85-626, 72 Stat. 574 (Appendix B, p. 5), which provided, so far as here material:

> "* * * That nothing in this section or elsewhere in this Act shall be construed or applied to forbid or make unlawful any dual rate contract arrangement *in use* by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act * * *." (Emphasis supplied)

The choice of the words "in use" was deliberate. The object clearly was to protect all systems which had been put into operation before *Federal Maritime Board* v. *Isbrandtsen* from judicially declared stand-

[6] H.R. Rep. No. 2055, 85th Cong., 2d Sess. (1958), Sen. Rep. No. 1709, 85th Cong., 2d Sess. (1958), and H.R. Rep. No. 498, 87th Cong., 1st Sess. 3 (1961).

ards of illegality until the Congress could decide what, if any, contract systems should be authorized. However, Pub. L. 85-626 did not protect systems which might be initiated after the judicial standards had been declared. Hence the thrust of that Act was retrospective and not at all prospective. Pub. L. 85-626, which was to expire on June 30th, 1960, was extended to October 15th, 1961.[7] Effective October 3rd, 1961, the Congress enacted the permanent law affecting contract systems—Pub. L. 87-346, 75 Stat. 762 (Appendix B, pp. 9-20).

By §1 of this Act, the Congress added to the Shipping Act §14b, 75 Stat. 762 (46 U.S.C. §813a) prescribing the manner in which the Commission could *permit* new contract systems to be adopted. Conferences which were using contract rate systems on May 19th, 1958 which had been continued effective by the interim statutes, received separate treatment under §3 of the permanent legislation (Appendix B, p. 15):[8]

> "* * * all existing [contract rate] agreements which are lawful under the Shipping Act, 1916, immediately prior to the enactment of this Act, shall *remain* lawful unless disapproved, cancelled or modified by the Commission pursuant to the provisions of the Shipping Act, 1916 as amended by this Act. * * *" (Emphasis supplied).

The permanent legislation (Pub. L. 87-346) contained provisions which would render some of these old contract systems illegal unless amended to conform to

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[7] Pub. L. 86-542, 74 Stat. 253; Pub. L. 87-75, 75 Stat. 195; and Pub. L. 87-252, 75 Stat. 521 (Appendix B, pp. 6-8).

[8] Section 3, 75 Stat. 764, has not been codified but is set forth in the note following 46 U.S.C.A. §813a.

the new statute. As to them, §3 contained a proviso giving the conferences having such old systems a limited time within which to conform them to the new requirements.

While the first interim bill was before the House Committee on Merchant Marine and Fisheries, the Department of Justice wrote a letter to Chairman Bonner of the House Committee (H. R. Rep. No. 2055, 85th Cong., 2d Sess. (1958) 5) which stated:

> "We further note that H.R. 12751 goes beyond merely restoring the situation as it existed prior to the Supreme Court decision. In an earlier stage of this litigation, the Court of Appeals for the District of Columbia Circuit held in January 1954 that section 15 of the Shipping Act, 1916, 'makes it illegal to institute the dual-rate system' without prior approval of that system by the Federal Maritime Board (*Isbrandtsen Co. v. United States*, 211 F. 2d 51, certiorari denied, 347 U.S. 990. H.R. 12751, however, would validate any existing dual-rate arrangement, whether or not it had been approved by the Board, unless and until the Board disapproves, cancels, or modifies such arrangement."

With this advice from the counsel to our Government, the House Committee reported out, and the House adopted, the bill which became the first interim legislation. Chairman Celler of the House Judiciary Committee, who opposed this legislation, spoke to like effect (104 Cong. Rec. 15,643 (1958)). Three qualified commentators have expressed the same view.[9]

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[9] Staff of Subcommittee No. 5, House Judiciary Committee, Report on the Ocean Freight Industry, H. R. Rep. No. 1419, 87th Cong., 2d Sess. 215 n.23 (1962); Walden, The Dual-Rate Morato-

As relates to existing contract systems, the statute obviously substituted the concept of legality pending disapproval for the concept in the Shipping Act, as originally written, of illegality pending approval. That concept was carried through the interim bills and was incorporated in §3 of the final legislation.

The Department of Justice argued below that 61 Stat. 633 (1 U.S.C. §109) precludes interpretation of the interim and final legislation as destroying causes of action which arose prior to May 19th, 1958.

Secondly, §109 has always been applied to legislation which alters the text of an existing statute or repeals it in whole or in part. By way of contrast, Pub. L. 85-626, as extended, made no change whatsoever in the existing language of the Shipping Act.[10]

Two answers to this contention appear conclusive. First, §109 makes an exception of cases where the statute expressly provides for the release of existing liabilities. The congressional mandate that nothing in the Shipping Act should be construed or applied to forbid or make unlawful any dual rate arrangement *in use* by a conference on May 19th, 1958, clearly applies whether the transaction giving rise to a claim of illegality occurred before or after May 19th, 1958. Had the purpose of Congress been to effect prospective legalization, the statute would

rium—End of the Isbrandtsen Odyssey, 10 J. Pub. L. 78, 79 (1961); Auerbach, The Isbrandtsen Case and its Aftermath, 11, 1959 Wis. L. Rev. 369, 389. Professor Auerbach was of counsel for the conference involved in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958). However, his retainer by that conference terminated upon the submission of that case.

[10] Prior to the August 12th, 1958 legislation, the Shipping Act did not mention contract systems.

simply have stated that contract systems in use on May 19th, 1958, shall be lawful until June 30th, 1960.

In view of the literal meaning of the language of these Acts and their legislative history, they should be construed liberally, and not so as to distort the statutory language. *Haggar* v. *Helvering*, 208 U.S. 389, 394 (1940) and cases cited; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 128-129 (1944).

## III. In Reversing the Commission's Denial of Reparation, the Decision Below Conflicts with Decisions of This Court.

In reversing, the court below remanded these cases to the Commission for the assessment of reparations. This ruling was not alone erroneous, but was also in direct conflict with the decisions of this Court.

Kempner offered no evidence of damages due to discrimination. Mr. Welch, Kempner's trial counsel, disclaimed any proof of damages. The following between the trial examiner and Kempner's counsel tells the story (J. A. 98):

> Examiner Basham: "You say you are not claiming any damages for sales you lost."
>
> Mr. Welch: "Not any monetary damages."
>
> Examiner Basham: "Your damage was represented only by the difference in the contract and non-contract rates?"
>
> Mr. Welch: "The damage for which we are asking compensation is limited to that."

Indeed, Harris Kempner, the manager of the Kempner group, testified that in trades where, by using non-conference tonnage, he had a freight advantage over his competitors, he gained no business thereby (J. A. 134). On the basis of the above, the Court of Appeals should have dismissed these cases even if it had decided all of the other issues in Kempner's favor.

The decision below is in direct conflict with *I.C.C.* v. *United States*, 289 U.S. 385 (1933), and *Penn. R. Co.* v. *International Coal Co.*, 230 U.S. 184 (1913).

In *I.C.C.* v. *United States, supra*, this Court stated, with respect to a shipper seeking reparation for unjust discrimination under the Interstate Commerce Act (289 U.S. at 390-391):

> "He is to recover the damages that he has suffered, which may be more than the preference or less (*Penn. R. Co.* v. *International Coal Co., supra*, pp. 206, 207), but which, whether more or less, is something to be proved and not presumed. *Ibid.*, p. 204. 'Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted.' *Keogh* v. *C. & N.W. Ry. Co., supra*, p. 165. The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.
>
> "The answer to that question is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula. If by a reason of the discrimination,

> the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price [citing cases], damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Any holding that, under the proof of this case, the Commission could assess any reparation is squarely in conflict with the above decisions of this Court.

At all times here in question there was no remedy for overcharge under the Shipping Act, 1916, as amended. Cases which arose under the Interstate Commerce Act have no application here since the Interstate Commerce Commission, at the time those cases were decided, did have the authority to award damages for overcharge, *i.e.*, the difference between the rate charged and the tariff rate or the rate held to be a reasonable rate.

Experience under the Interstate Commerce Act teaches that, notwithstanding the recent grant to the Commission of the power to award reparation for overcharges,[11] proceedings for reparation for discrimination will still be brought in substantial numbers. It is of the maximum importance that this Court determine whether the rule laid down in the decisions of this Court above cited are fully applicable to proceedings for reparation for *discrimination* under both the Shipping Act and the Interstate Commerce Act.

[11] Section 18(b)(3), added to the Shipping Act in 1961 by §4 of Pub. L. 87-346 (Appendix B, pp. 17-18

## CONCLUSION

**For the foregoing reasons, we respectfully urge that the petition for a writ of certiorari herein sought should be granted.**

Respectfully submitted,

New York, N.Y.
May 27, 1963

HERMAN GOLDMAN,
ELKAN TURK,
ELKAN TURK, JR.,
SOL D. BROMBERG,
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*Counsel for Petitioner.*

## Appendix A

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,658

---

H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION (formerly FEDERAL MARITIME BOARD) and UNITED STATES OF AMERICA, RESPONDENTS

GULF MEDITERRANEAN PORTS CONFERENCE, ET AL., The Common Carriers by Water, Members of THE FAR EAST CONFERENCE, INTERVENORS

---

Petition for Review of an Order of the Federal Maritime Commission

Decided January 10, 1963

*Mr. Shelby Fitze*, with whom *Messrs. Delmar W. Holloman* and *James T. Welch* were on the brief, for petitioners.

*Mr. Paul D. Page, Jr.*, Attorney, Federal Maritime Commission, with whom *Mr. James L. Pimper*, Gen-

eral Counsel, Federal Maritime Commission, was on the brief, for respondent Federal Maritime Commission. *Messrs. Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Thomas D. Wilcox*, Attorney, Federal Maritime Commission, also entered appearances for respondent Federal Maritime Commission.

*Mr. Joel E. Hoffman*, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief, for respondent United States.

*Mr. Edward S. Bagley*, of the bar of the Supreme Court of Louisiana, *pro hac vice*, by special leave of court, for intervenors Gulf Mediterranean Ports Conference, et al. *Mr. Joseph M. Rault* was on the brief for intervenors Gulf Mediterranean Ports Conference, et al.

*Mr. Elkan Turk, Jr.*, with whom *Mr. Elkan Turk* was on the brief, for intervenors The Common Carriers by Water, Members of the Far East Conference.

Before WILBUR K. MILLER, DANAHER and WRIGHT, *Circuit Judges*.

PER CURIAM: The Federal Maritime Board[1] denied reparations sought by the petitioners because of the

[1] The agency has gone through a succession of names. Since 1961 it has been called the Federal Maritime Commission.

imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; and that, in any event, the so-called Moratorium Act[2] protected the carriers from liability which accrued before its passage.

The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.

*Reversed and remanded to the Commission for assessment of reparations.*

DANAHER, *Circuit Judge*, dissenting: The Supreme Court on May 19, 1958 decided *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, holding that a dual rate system which is "designed to destroy the competition of independent carriers" or "to stifle outside competition" or which otherwise employs predatory devices constitutes a "resort to other discriminating or unfair methods" in violation of section 14 of the Shipping Act of 1916.[1] As of the date of the Court's opinion, there were in existence many dozens of "conferences" subject to the jurisdiction of the Board.

Congress moved promptly because of the "grave doubts cast by the Supreme Court decision upon the

[2] The Moratorium Act, 72 Stat. 574, amended Section 14 of the Shipping Act of 1916, 39 Stat. 733, 46 U.S.C. § 812.

[1] 46 U.S.C. § 801 *et seq.*

legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce."[2] The Senate feared for the "legality of the thousands of exclusive patronage dual rate contracts then used by more than half the 113 inbound and outbound steamship conferences serving U.S. ports. For many years, these dual rate conferences and the shippers they served had been parties to such contracts, with the tacit or express approval of the Federal Maritime Board."[3]

Congress therefore amended section 14 of the Shipping Act of 1916 "to provide that nothing in that act made unlawful any dual rate contract arrangement in effect at the time of the Supreme Court's decision (May 19, 1958), *unless and until disapproved, canceled, or modified by the Federal Maritime Board, in accordance with the standards in section 15 of the act.*"[4] (Emphasis added.)

Congress was not concerned with "rates." It deemed, however, of vital interest—at least until Congress had an adequate opportunity to review the problem—the threat to "any" dual rates. Clearly Congress considered that not all dual rate systems came within the purview of the Supreme Court's decision.

While the legislation was pending the Department of Justice reemphasized its historic position that "the system is inconsistent with the basic tenets of anti-

[2] H.R. Rep. No. 498, 87th Cong., 1st Sess. 3 (1961).
[3] S. Rep. No. 473, 87th Cong., 1st Sess. 2 (1961).
[4] *Ibid.*

trust philosophy."[5] but the Department's letter also emphasized[6] *that the legislation*

> "would validate any existing dual-rate arrangement, whether or not it had been approved by the Board, unless and until the Board disapproves, cancels, or modifies such arrangement. There are a number of conferences which now employ a dual-rate system that has not been expressly approved by the Board. The bill would permit these conferences to continue to use their unapproved systems, even though they have been on notice for more than four years that such unapproved systems are illegal, and even though such systems would have been illegal even if the Supreme Court decision had gone the other way. However, in view of our having been advised that it is administratively not feasible for the Board to act on all of the as yet unapproved dual-rate arrangements in the next 2 years, the Department interposes no objection to this provision of the bill."

Thus fully advised in the premises and after extensive House hearings, Congress adopted Public Law

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[5] Letter of the Deputy Attorney General dated June 11, 1958 directed to Chairman Bonner of the House Committee on Merchant Marine and Fisheries.

[6] And for the reasons stated, our opinion in Isbrandtsen Co. v. United States has no bearing here. See 93 U.S.App. D.C. 293, 211 F.2d 51, *cert. denied*, 347 U.S. 990 (1954).

85-626[7] which amended section 14 of the Shipping Act of 1916 by inserting the following:

> "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, *unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act.* The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree." (Emphasis added.)

So read the law when the Board decided this case on August 4, 1961. Congress had amended the very Act from which the Board derived whatever authority it may have. Congress had spoken in behalf of a public policy of nearly a half century. As I read it, both the language of the statute and the congressional purpose are clear. It seems to me that on this

[7] 72 STAT. 574, as amended by 74 STAT. 253 extending the expiration date to June 30, 1961 and as further amended by 75 STAT. 195 extending the expiration date to September 15, 1961.

record the Board could have done nothing but what it did do.[8]

Accordingly, I dissent.

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[8] As a matter of additional emphasis, it should be noted that the 1958 amendment, as amended respecting expiration, was drafted to apply only to an arrangement, like that before us, in actual use by the members of a conference "on May 19, 1958," the date of the Court's Isbrandtsen decision, *supra*.

"Congress, during the moratorium it had thus created, conducted extensive hearings, running through thousands of pages, as to which see H.R. REP. No. 498, 87th Cong., 1st Sess. (1961); S. REP. No. 860, 87th Cong., 1st Sess. (1961); H.R. REP. No. 1247, 87th Cong., 1st Sess. (1961) [reproduced in 107 Cong. Rec. 19289-19291 (1961)]; and see, generally, Index to the Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. (1962). Thereupon, Congress enacted Public Law 87-346 (75 STAT. 762), approved October 3, 1961.

See section 15 as there amended in terms of congressional acceptance of the administrative interpretation, so long established, with specific requirements as to disapproval only after notice and hearing, and on the grounds specified. All "other agreements" coming within the purview of section 15 were to be approved.

It seems to me that congressional policy in this field beyond peradventure has been restated and reinforced. 46 U.S.C. § 814, e.g., additionally provides, as pertinent, that henceforth every permitted section 15 "agreement" like every section 813a "contract," the use of which may be permitted "by order" after the notice and hearing specified in section 813a, shall be entitled to the protection of the "exceptions" provided in sections 1-11 and 15 of Title 15.

## Appendix B

### Pertinent Sections of the Shipping Act

SEC. 15. 46 U. S. C. §814 (1952). 39 Stat. 733. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares, giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and

shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

*Appendix B*

SEC. 16, 46 U.S.C. §815. (1952) 39 Stat. 734. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company, or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as

is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17, 46 U.S.C. §816 (1952); 39 Stat. 734. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Section 22, 46 U.S.C. §821 (1952):

"Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation

of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation."

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PUBLIC LAW 85-626; 72 STAT. 574

[S. 3916]

An Act to amend the Shipping Act, 1916.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 14 of the Shipping Act, 1916, is amended by inserting at the end thereof the following: "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regula-

tory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree."

SEC. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after June 30, 1960.

Approved August 12, 1958.

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PUBLIC LAW 86-542; 74 STAT. 253

[H. R. 10840]

An Act to amend Public Law 85-626 relating to dual rate contract agreements.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 2 of the Act entitled "To amend the Shipping Act, 1916", approved August 12, 1958 (72 Stat. 574), is amended by striking out "1960" and inserting in lieu thereof "1961".

Approved June 29, 1960.

*Appendix B*

PUBLIC LAW 87-75; 75 STAT. 195

[S. 2154]

An Act to amend Public Law 85-626, as amended by Public Law 86-542, relating to dual rate contract agreements.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 2 of the Act entitled "To amend the Shipping Act, 1916", approved August 12, 1958 (72 Stat. 574), as amended by an Act approved June 29, 1960 (74 Stat. 253), is further amended by striking out "June 30, 1961" and inserting in lieu thereof "September 15, 1961".

Approved June 30, 1961.

*Appendix B*

PUBLIC LAW 87-252; 75 STAT. 521

[H. R. 3156]

An Act to make the Panama Canal Company Immune from attachment or garnishment of salaries owed to its employees, and to amend the Shipping Act, 1916.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Paragraph (d) of section 248 of title 2, Canal Zone Code, as added by section 2 of the Act of June 29, 1948 (62 Stat. 1078), is amended to read as follows:

"(d) May sue and be sued in its corporate name, but no attachment, garnishment, or similar process shall be issued against salaries or other moneys owed by the Company to its employees".

SEC. 2. That section 2 of the Act of August 12, 1958, as amended, is amended to read as follows:

"SEC. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after October 15, 1961: *Provided, however*, That contracts in effect midnight September 14, 1961, shall remain in effect until midnight October 15, 1961, unless such contracts terminate earlier by their own terms or are rendered illegal under the terms of the first section of this Act."

Approved September 16, 1961.

*Appendix B*

PUBLIC LAW 87-346

87TH CONGRESS, H. R. 6775

OCTOBER 3, 1961

AN ACT

75 STAT. 762.

To amend the Shipping Act, 1916, as amended, to authorize ocean common carriers and conferences thereof, serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Shipping Act, 1916, is amended by adding after section 14a a new section to read as follows:

"SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission') shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to

the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however*, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided,*

*however*, That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however*, That upon finding that economic factors so warrant the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized in whole or with respect to any commodity: *Provided, however*,

That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

SEC. 2. Section 15, Shipping Act, 1916, is amended to read as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transporation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or

apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of

other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonably notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

SEC. 3. Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Com-

mission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

SEC. 4. Section 18, Shipping Act, 1916, is hereby amended as follows:

(a) Insert "(a)" immediately after the section number "18".

(b) Add the following subsection 18(b):

"(b)(1) From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transporation agreement. Copies of such tariff shall be made available to any person and a reasonable charge may be made therefor. The

requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count.

"(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however*, That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days ~~herein~~ specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

"(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transporation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file

with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any priyilege or facility, except in accordance with such tariffs.

"(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

"(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

"(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

SEC. 5. Section 20, Shipping Act, 1916, is amended by changing the period at the end thereof to a semicolon and adding the following: "or to prevent any common carrier by water which is a party to a conference agreement approved pursuant to section 15 of this Act, or any other person subject to this Act, or any receiver, trustee, lessee, agent, or employee

of such carrier or person, or a[illegible]erson authorized by such carrier to rec[illegible]nation, from giving information to the con[illegible]any person, firm, corporation, or agency de[illegible]by the conference, or to prevent the confer[illegible]its designee from soliciting or receiving infor[illegible]for the purpose of determining whether a ship[illegible]or consignee has breached an agreement with the conference or its member lines or of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act shall be unlawful."

SEC. 6. Section 16 First, Shipping Act, 1916 (39 Stat. 734; 46 U.S.C. 815), is hereby amended by deleting the period at the end thereof and adding the following: " : *Provided*, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall deter-

mine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation."

SEC. 7. The Shipping Act, 1916, is hereby amended by inserting a new section 43 reading as follows:

"SEC. 43. The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act."

Approved October 3, 1961.

II. Review Act of 1950, 64 Stat. 1129, as amended, 5 U.S.C. §1031 *et seq.*:

Section 10, 5 U.S.C. §1040:

"An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in Section 1254 (1) of Title 28: *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United

States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (3) of Title 28, regarding certification, and of section 2101 (c) of Title 28, regarding stays, shall also apply to proceedings under this chapter."

III. Title 28 U.S.C.—Judiciary and Judicial Procedure:

Section 1254. Courts of appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

## Appendix C

Copy of
United States Shipping Board Bureau
Agreement No. 4844
Dated: January 8, 1936
Filed: January 14, 1936
Approved: February 12, 1936
Cancelled: June 30, 1939

THIS AGREEMENT made this 8th day of January, 1936, at New York, N.Y., between the GULF PACIFIC MAIL LINE, LTD., hereinafter called the "Intercoastal Carrier", party of the first part, and the members of the Far East Conference, hereinafter called the "Conference Carriers", party of the second part.

*Witnesseth:*

THAT, in consideration of the mutual benefits and advantages to be derived out of this agreement, and in order to stabilize rates in the trade under the jurisdiction of the Far East Conference, namely, from Atlantic and Gulf Ports of the United States to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands, the parties hereto, common carriers by water subject to the Shipping Act, 1916, as amended, hereby agree with each other as follows:

1. The Intercoastal Carrier agrees that on all through shipments of cargo transported on vessels owned, controlled, chartered, and or operated by it from United States Atlantic or Gulf Ports for transshipment at Pacific Coast Ports to Ports under the jurisdiction of the Far East Conference, the through

rates which it will apply will be no lower than the rates provided in the tariffs of the Far East Conference, and that in connection with said through shipments it will abide by all applicable rules, regulations, and conditions of said Conference tariffs.

2. It is further agreed by the Intercoastal Carrier that it will transhipp all such cargo at Pacific Coast ports to vessels of carriers which are members of the Far East Conference and or the Pacific Westbound Conference.

3. The Conference Carriers agree that they will give the Intercoastal Carrier the privilege of participating in the carriage of cargo of shippers having contracts with Conference Carriers, at rates and under conditions provided in said contracts.

4. This agreement is subject to cancellation by either party giving thirty (30) days' written notice to the other party and to the United States Shipping Board Bureau, Department of Commerce, Washington, D.C.

GULF PACIFIC MAIL LINE, LTD.
Swayne & Hoyt, Ltd., Managing Agents
By: (Sgd) C. W. Cook G
Vice President

*Appendix C*

Filed by authority of and on behalf of the following Members of the Far East Conference:

AMERICAN PIONEER LINE
BARBER STEAMSHIP LINES, INC.
BANK LINE, LTD. (BANK LINE)
DOLLAR STEAMSHIP LINES, INC., LTD.
THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.
THE OCEAN STEAM SHIP COMPANY, LTD.
NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN"
(ALFRED HOLT & CO., Managers)
ELLERMAN & BUCKNALL STEAMSHIP CO., LTD.
NORTON, LILLY & COMPANY, as General Agents
ISTHMIAN STEAMSHIP COMPANY
KERR STEAMSHIP COMPANY, INC.
KOKUSAI KISEN KABUSHIKI KAISHA
NIPPON YUSEN KAISHA
OSAKA SHOSEN KAISHA
PRINCE LINE, LTD.

By: (Sgd.) PAUL ALBERT
Paul Albert, Secretary
Far East Conference

Dollar Steamship Lines, Inc., Ltd.
changed its name to
American President Lines, Ltd.
effective November 21, 1938.

## Appendix D

F.M.B. Dockets 726, 733-4-5

Exhibit No. 166A
[Received 10/20/55]

List of Agreements approved under Section 15 of the Shipping Act, 1916, to which the members of the Far East Conference have been parties, and which contained provisions to the same effect as Article 3 of the F.M.B. Agreement No. 4844, which is Exhibit 166, in evidence.

| Agreement No. | Party Other Than Members Of The Far East Conference | Date of Approval | If Terminated Or Cancelled, Applicable Date |
|---|---|---|---|
| 3197 | Argonaut Steamship Line Inc. | 7/13/34 | 5/28/35 |
| 3198 | McCormick Steamship Company | 7/13/34 | 2/ 2/42 |
| 3199 | (Grace Line) Panama Mail Steamship Company | 7/13/34 | 6/30/39 |
| 3200 | Luckenbach Steamship Company, Inc. | 7/13/34 | 2/15/53 |
| 3201 | American Line S.S. Corp. (Panama Pacific Line)* | 7/13/34 | 3/ 7/39 |
| 3458 | Nelson Steamship Company | 9/ 3/34 | 5/12/38 |
| 3496 | Sudden & Christenson (Harold Line) | 10/11/34 | 1/ 4/53 |
| 3616 | Luckenbach Gulf Steamship Company, Inc. | 11/16/34 | 2/15/53 |
| 3652 | American-Hawaiian Steamship Company | 11/19/34 | 12/22/52 |

* By Agreement No. 6486 approved December 9, 1938, and cancelled April 15, 1953, Baltimore Mail Steamship Company (Panama Pacific Line) was substituted as a party in place of American Line S.S. Corp. (Panama Pacific Line).

*Appendix D*

| Agreement No. | Party Other Than Members Of The Far East Conference | Date of Approval | If Terminated Or Cancelled, Applicable Date |
|---|---|---|---|
| 3657 | Williams Steamship Corporation | 11/19/34 | 2/13/37 |
| 3720 | Gulf Pacific Line, Swayne & Hoyt, Ltd., Managing Owners | 11/28/34 | 4/12/40 |
| 4440 | Dollar Steamship Lines, Inc., Ltd. | 8/29/35 | 1/29/53 |
| 4465 | Shepard Steamship Co. | 10/16/35 | 2/21/42 |
| 4589 | (Quaker Line) Pacific-Atlantic Steamship Co. | 5/15/36 | 1/5/53 |
| 4591 | States Steamship Company (California-Eastern Line) | 10/22/35 | 1/5/53 |
| 4665 | Pacific Coast Direct Line, Inc. | 11/23/35 | 1/5/53 |
| 3957 | Societa Franco-Iberique D'Armoment (Franco-Iberian Line)* | 3/6/36 | — |

* Unlike all of the other Agreements in this enumeration which deal with initial carriage westbound by intercoastal carriers to Pacific coast ports for transshipment to destinations within the scope of the Far East Conference Agreement, this Agreement applies to carriage of goods on Franco-Iberian Line vessels from U.S. Atlantic or Gulf ports for through transportation with transshipment at European ports to ports within the scope of the Far East Conference Agreement.